2 3 4 5 б 7 NO. 79661-1 8 SUPREME COURT 9 OF THE STATE OF WASHINGTON 10 TESORO REFINING AND MARKETING 11 COMPANY, 12 Plaintiff-Petitioner, 13 vs. ADDITIONAL AUTHORITIES 14 STATE OF WASHINGTON, DEPARTMENT) OF REVENUE, ...15 Defendant-Respondent. 16 17 18 Under RAP 10.8, Petitioner Tesoro Refining and Marketing Company ("Tesoro") hereby 19 submits the following additional authorities: 20 Statutory Interpretation and Construction. Regarding whether the meaning of 21 "or" presents a question of statutory construction, Tesoro submits the following authority: 22 State v. Keller, 98 Wn.2d 725, 729, 657 P.2d 1384 (1983) (the word "and" is 23 frequently interpreted by courts to mean "or," quoting 1A C. Sands, Statutory Construction 24 § 21.14, at 91 (4th ed. 1972) ("[t]here has been, however, so great laxity in the use of these 25 ['and' and 'or'] terms that courts have generally said that the words are interchangeable and that

PETITIONER'S THIRD SUPPLEMENTAL

STATEMENT OF ADDITIONAL AUTHORITIES -1-

DORSEY & WHITNEY LLP

U.S. BANK BUILDING CENTRE 1420 FIFTH AVENUE, SUITE 3400 EATTLE, WASHINGTON 98101 one may be substituted for the other, if to do so is consistent with the legislative intent") (citing State v. Tiffany, 44 Wash. 602, 604, 87 P. 932 (1906)).

- 2. <u>Administrative Agency Procedure.</u> Regarding whether Washington follows the federal rule under which taxpayers are not entitled to rely on erroneous regulations or rulings of the Internal Revenue Service, <u>see</u> Department of Revenue's Supplemental Brief at 13 n.4 (citing decisions of the United States Supreme Court), Tesoro Submits the following authorities:
- Hansen Baking Co. v. City of Seattle, 48 Wn.2d 737, 743-44, 296 P.2d 670 (1956) ("An administrative agency may not retroactively impeach its own general rules because of asserted errors of fact, judgment, or discretion on its own part. If it were permissible for a taxing agency to challenge, years later, such rules promulgated by its own enforcement agency, taxpayers would never be able to close their books with assurance").
- Group Health Cooperative of Puget Sound, Inc. v. Washington State Tax Comm'n, 72 Wn.2d 422, 428-29, 433 P.2d 201 (1968) (citing and quoting with approval from Hansen).

Copies of these authorities are attached for the Court's convenience.

RESPECTFULLY SUBMITTED this 23°d day of January, 2008.

FILED AS ATTACHMENT
TO E-MAIL

DORSEY & WHITNEY LLP

George C. Mastrodonato, WSBA #07483

John B. Schochet, WSBA #35869

Dorsey & Whitney LLP

1420 Fifth Avenue, Suite 3400

Seattle, WA 98101-4010

(206) 903-8800

2.2.

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24

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TALMADGE LAW GROUP PLLC

Michael B. King, WSBA #14405 Talmadge Law Group PLLC

18010 Southcenter Parkway

Tukwila, WA 98188-4630

(206) 574-6661

Attorneys for Petitioner Tesoro Refining and Marketing Company

DECLARATION OF SERVICE

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On the date set forth below, I deposited in the U.S. Mail and sent by electronic (e-mail) a true and accurate copy of the foregoing Petitioner's Third Supplemental Statement of Additional Authorities in Cause No. 79661-1 to the following:

Anne E. Egeler, Esq. Office of the Attorney General of Washington P.O. Box 40100

Olympia, WA 98504-0100

AnneE1@atg.wa.gov

Kristopher I. Tefft, Esq. Association of Washington Businesses

P.O. Box 658

Olympia, WA 98507-0658 KrisT@awb.org

Garry G. Fujita, Esq.

Davis Wright Tremaine LLP

1201 3rd Avenue, Suite 2200 Seattle, WA 98101-3045

GarryFujita@dwt.com

Michael R. Barr, Esq. Pillsbury Winthrop Shaw Pittman, LLP

50 Fremont Street

San Francisco, CA 94105

Michael.Barr@pillsburylaw.com

I declare under penalty of perjury under the laws of the State of Washington and the

United States that the foregoing is true and correct.

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TO E-MAIL

23,208, at Seattle, Washington.

State v. Keller, 98 Wn.725, 657 P.2d 1384 (1983)



657 P.2d 1384

98 Wash.2d 725, 657 P.2d 1384

(Cite as: 98 Wash.2d 725, 657 P.2d 1384)

C

Supreme Court of Washington,
En Banc.
The STATE of Washington, Respondent,
v.
Lorene Alice KELLER, Appellant.
No. 48872-0.

Feb. 10, 1983.

The Superior Court, Pierce County, William L. Brown, Jr., J., entered order revoking individual's conditional release from state hospital, and individual appealed. The Supreme Court, Cunningham, J. pro tem., held that: (1) the trial judge could revoke conditional release if the individual either violated a condition of release or presented a substantial danger to other persons, and (2) evidence that, after her last conditional release, individual's paranoic fear reappeared and that individual once again began accusing people of poisoning her was sufficient to warrant revocation on ground that individual was dangerous to others.

Affirmed.

West Headnotes

[1] Statutes \$\infty\$ 181(1)

361k181(1) Most Cited Cases

The primary objective in interpreting a statute is to ascertain and give effect to the intent of the legislature.

[2] Statutes \$\infty\$ 189

361k189 Most Cited Cases

Although a court may not read into a statute that which the legislature has omitted, the court may construe a statute so as to avoid strained or absurd consequences which could result from a literal reading.

[3] Mental Health \$\infty\$=440

257Ak440 Most Cited Cases

Statute requiring the court in a proceeding to re-

voke a conditional release from a state hospital in criminal insanity case to determine whether the conditionally released person did or did not adhere to the terms and conditions of his release, and is a substantial danger to other persons, or presents a substantial likelihood of committing felonious acts jeopardizing public safety or security does not prohibit a trial court from revoking an individual's conditional release, no matter how dangerous that individual is, unless a condition of release was violated. West's RCWA 10.77.190(3).

[4] Mental Health 440

257Ak440 Most Cited Cases

A trial court may revoke a conditional release from a state hospital in criminal insanity case if the individual either violates a condition of release or presents a substantial danger to other persons. West's RCWA 10.77.190(3).

[5] Mental Health @=31

257Ak31 Most Cited Cases

The state has a legitimate interest in ensuring the safety and security of its citizens by the commitment of individuals who are dangerous. West's RCWA 10.77.190(3).

[6] Mental Health 440

257Ak440 Most Cited Cases

Evidence indicating that, after conditional release of individual who had been committed after she shot and killed her father in belief that he was poisoning her, her paranoic fear reappeared and that she once again began accusing people of poisoning her was sufficient to warrant revocation of individual's conditional release from state hospital on ground that she presented a substantial danger to other persons. West's RCWA 10.77.190(3).

*726 **1385 Evergreen Legal Services, Michael Mirra, Steilacoom, for appellant.

Don Herron, Pierce County Prosecutor, Michael Johnson, Deputy Pros. Atty., Tacoma, for respondent.

CUNNINGHAM, Justice Pro Tem.

(Cite as: 98 Wash.2d 725, 657 P.2d 1384)

This case comes before us on certification from Division Two of the Court of Appeals. Appellant, Lorene Alice Keller, seeks review of a trial court order revoking her conditional release from Western State Hospital. We affirm.

The facts leading to this dispute are as follows: On July 20, 1975, appellant shot and killed her father, Floyd Marvin Woods. This act was apparently prompted by appellant's beliefs that her father had poisoned her mother and was poisoning her. Appellant also imagined that her father was transmitting messages to her through electronic devices implanted in her body. At her trial for first degree murder, the trial judge found that appellant suffered from chronic paranoid schizophrenia and acquitted her by reason of insanity. Appellant was then committed to Western State Hospital (WSH) where her mental condition was treated.

In 1977, appellant applied for and received conditional release status under the terms of RCW 10.77.150. That section provides for conditional release after a hearing in which it is determined that the individual may be released "without substantial danger to other persons, or substantial likelihood of committing felonious acts jeopardizing public safety or security." RCW 10.77.150(2). Acting under the authority of RCW 10.77.190(3), the trial court revoked this order of conditional release in May of 1979. At that time the court found that the **1386 appellant was again experiencing *727 transmissions and that the transmissions "adversely affected her ability to perform everyday tasks." Clerk's Papers, at 19. In May of 1980, appellant reapplied for release from WSH. The trial court approved her petition setting out inter alia the following conditions:

- (3) That her (Ms. Keller's) progress will be monitored and recorded monthly by Community Program staff and a report submitted to the Court every three months, or if there is a substantial change in the treatment plan or Ms. Keller's condition.
- (4) That Ms. Keller will be returned to Western State Hospital, either voluntarily or involuntarily, pursuant to RCW 10.77.190, in the event of any

behavior indicating dangerousness to herself or others, and the Court shall be immediately notified of her return.

Clerk's Papers, at 8.

During the summer following her release, appellant "appeared to be under increasing stress from delusional 'transmissions' ". Finding of Fact 5. Also, she believed members of the hospital staff (where she resided as an outpatient) were trying to poison her. Her mental condition continued to deteriorate and on August 19, 1980, she was returned to WSH's locked ward.

At the revocation hearing, appellant argued that she had not violated any express condition of her release; therefore, revocation was improper. trial judge revoked her release, however, after finding that implicit in her release order was the understanding that her mental disease was in a significant state of remission and "that if, for whatever reason, her mental illness re-asserted itself to the degree that she became a danger to herself and to others, she would assuredly be re-confined". Clerk's Papers, at 2. Appellant brings this appeal to challenge the court's use of an "implicit", rather than "express" condition as the basis of revocation of her conditional release. We hold that revocation was proper, because the statute contemplates revocation whenever a releasee is dangerous. Our disposition makes it unnecessary to reach the issue of whether the trial judge's reliance on implicit conditions was proper.

*728 Appellant's release was revoked pursuant to former RCW 10.77.190(3). That section provided:

(3) The court, upon receiving notification of the apprehension, shall promptly schedule a hearing. The issue to be determined is whether the conditionally released person did or did not adhere to the terms and conditions of his release, and is a substantial danger to other persons, or presents a substantial likelihood of committing felonious acts jeopardizing public safety or security. Pursuant to the determination of the court upon such hearing, the conditionally released per-

(Cite as: 98 Wash.2d 725, 657 P.2d 1384)

son shall either continue to be conditionally released on the same or modified conditions or his conditional release shall be revoked and he shall be committed subject to release only in accordance with provisions of this chapter.

Appellant argues that this section requires that the court find that an individual has both violated an express term of the conditional release and that he or she presents a substantial danger to others. Appellant's argument presents an issue of first impression for this court involving questions of statutory interpretation. For the reasons set out below, we hold that a trial judge may revoke conditional release if the individual either violates a condition of release or presents a substantial danger to other persons.

[1][2] This court's primary objective in interpreting a statute is to ascertain and give effect to the intent of the Legislature. <u>Janovich v. Herron.</u> 91 Wash.2d 767, 771, 592 P.2d 1096 (1979). Although courts may not read into a statute that which the Legislature has omitted, we may construe a statute so as to avoid strained or absurd consequences which could result from a literal **1387 reading. See <u>State v. Martin.</u> 94 Wash.2d 1, 614 P.2d 164 (1980); <u>State v. The (1972) Dan J. Evans Campaign Comm.</u> 86 Wash.2d 503, 508, 546 P.2d 75 (1976).

[3][4] In the case before us, appellant argues that the word "and" is unambiguous. Consequently, under established principles of statutory construction, this court may not interpret this statute. She argues further that the two clauses in this sentence must be read in the conjunctive. *729 Under appellant's interpretation of the statute, a trial judge may not revoke an individual's conditional release, no matter how dangerous that individual is, unless a condition of release was violated. We disagree.

To begin with, the principles governing statutory interpretation are not as clear as those proposed by appellant. In fact, the very word at issue here, "and", has been frequently interpreted by courts to mean "or". As noted by one leading commentator, [t]here has been, however, so great laxity in the

use of these ["and" and "or"] terms that courts have generally said that the words are interchangeable and that one may be substituted for the other, if to do so is consistent with the legislative intent.

(Footnote omitted.) 1A C. Sands, Statutory Construction § 21.14, at 91 (4th ed. 1972). See also State v. Tiffany, 44 Wash. 602, 604, 87 P. 932 (1906). More recently, Division One of the Court of Appeals substituted the term "and" for "or" in interpreting section .110 of RCW 10.77. See State v. Jones, 32 Wash.App. 359, 647 P.2d 1039 (1982). Jones involved the sentencing alternatives created by RCW 10.77.110. In Jones, the jury found that the defendant did not present a substantial danger of committing felonious acts, but did present a substantial danger to other persons. The court read the word "or" in sentences 1 and 3 of RCW 10.77.110 to mean "and", thus rejecting appellant's argument that the lack of a conjunctive word in that position required his conditional release. By so interpreting this statute, the court noted that this construction was necessary to avoid the absurd results.

[5][6] For reasons similar to those expressed in Jones, we find that RCW 10.77.190(3) requires that we interpret this section to effectuate the legislative intent. First, the State has a legitimate interest in ensuring the safety and security of its citizens by the commitment of individuals who are dangerous. See Alter v. Morris, 85 Wash.2d 414, 536 P.2d 630 (1975), In re Harris, 98 Wash.2d 276, 654 P.2d 109 (1982). In Harris, this court noted the difficulties associated with predictions *730 of whether an individual will become dangerous. Harris, at 281, 654 P.2d 109. Nonetheless, the court held that those difficulties did not prohibit civil commitment when there exists a substantial risk that the individuals will be dangerous to themselves or society. criminal insanity cases, the risk of danger is even more apparent and the judge's need to act to protect the public more urgent. In the case here, for instance, Ms. Keller's original commitment occurred after she shot and killed her father. She took that action because she believed that her father was poisoning her.

After her last conditional release, her paranoic fear reappeared, and once again she accused people of poisoning her. Given these facts, revocation was necessary. The law must be interpreted with sufficient flexibility to allow a trial judge to act to protect the public. This is the clear intent of RCW 10.77. See generally, State v. Jones, supra.

Furthermore, the interpretation of this statute urged by appellant ignores practical difficulties trial judges may encounter in drafting conditions of release. Appellant seems to imply that the trial judge should have expressly stated that the reoccurrence of transmissions would cause revocation. reasoning places too high a burden on the judge who drafts conditional release orders. To comply with such a mandate, the trial judge would have to review each **1388 case for symptoms that may produce violence and expressly make absence of each symptom a condition of release. This task, of identifying critical symptoms of mental illness, is beyond the expertise of most mental health personnel, let alone judges. Such a requirement would be counterproductive and contrary to the clear legislative purpose of RCW 10.77. We hold, therefore, that RCW 10.77.190 authorizes a trial judge to revoke conditional release upon a showing that the individual is dangerous. [FN1] Such was the case here, *731 and revocation was therefore proper.

FN1. We note that RCW 10.77.190(3) was recently amended. The new statute deletes all references to the individual's dangerousness. Under this statute, presumably the judge must make lack of dangerousness an explicit condition of release. We reserve this issue, however, for a case arising under the new statute.

The trial court is affirmed.

WILLIAM H. WILLIAMS, C.J., and STAFFORD, UTTER, BRACHTENBACH, DOLLIVER, DORE, DIMMICK and PEARSON, JJ., concur.

98 Wash.2d 725, 657 P.2d 1384

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Hansen Baking Co. v. City of Seattle, 48 Wn.2d 737, 296 P.2d 670 (1956)



296 P.2d 670

48 Wash.2d 737, 296 P.2d 670

(Cite as: 48 Wash.2d 737, 296 P.2d 670)

Supreme Court of Washington, Department 2. HANSEN BAKING CO., Inc., a corporation, Respondent,

٧.

CITY OF SEATTLE and W. C. Thomas, Comptroller of the City of Seattle,

Appellants.

No. 33419.

April 26, 1956.

Action by manufacturer seeking a refund of excise taxes, penalties, and interest paid to the city as a result of a delinquency assessment based on an erroneous method of computing the tax. The Superior Court, King County, Theodore S. Turner, J., entered judgment for manufacturer and the city and comptroller appealed. The Supreme Court, Hamley, C. J., held that under occupation tax ordinance authorizing uniform rules for purpose of ascertaining values of products transported out of city without prior sale, comptroller's administrative ruling authorizing use of cost method of determining value of bakery products transported out of city without prior sale was authorized and could not be retroactively abrogated.

Judgment modified so as to dismiss action as to city comptroller, individually, and as modified affirmed.

West Headnotes

11 Licenses © 21

238k21 Most Cited Cases

Where city comptroller sent letter to bakers' organization stating that it would be acceptable, in computing occupation tax, to use same method of arriving at value of products transported out of city without prior sale as had been set up by state which was either cost or not less than 70% of usual selling price, the letter was an administrative ruling as to acceptable method of measuring value.

[2] Constitutional Law @= 2621

92k2621 Most Cited Cases

(Formerly 92k77, 15Ak211, 361k219)

An administrative agency may not by means of interpretation or clarifying regulation, actually modify or amend a legislative enactment.

[3] Licenses \$\infty\$21

238k21 Most Cited Cases

Where occupation tax ordinance provided that tax rate should be applied against value of manufactured products and value should be gross proceeds from sales within city and gave city comptroller authority to use another measure of value in special cases where products are sold outside the city, the city comptroller's administrative ruling authorizing use of cost method of determining value of bakery products transported outside city without prior sale was authorized and did not conflict with the taxing ordinance.

[4] Licenses €==21

238k21 Most Cited Cases

If city comptroller erred in making a factual determination, or exercised unsound judgment, or abused his discretion in reaching the conclusion represented by the administrative ruling that under occupation tax ordinance it was permissible to use cost method as a measure of value of products transported outside city without prior sale, he was at liberty to alter his findings and conclusions, and promulgate a different rule but only for future application.

[5] Administrative Law and Procedure € 421 15Ak421 Most Cited Cases

An administrative agency may not retroactively impeach its own general rules because of asserted errors of fact, judgment, or discretion on its own part.

[6] Licenses 21

238k21 Most Cited Cases

Where occupation tax ordinance contemplated that regulations should be prescribed by the city comptroller to meet special circumstances and where city comptroller issued a ruling to that effect, city comptroller, who claimed that ruling was unreason-

able, had burden of proving his claim.

[7] Licenses 21

238k21 Most Cited Cases

Where administrative ruling of city comptroller authorized use of cost method under occupation tax ordinance as a measure of value of bakery products transported outside city without prior sale and value of bakery products, when measured by cost, approximated 65 to 67% of wholesale price but had value been measured, as permitted by ordinance, by sales to commissionmen who sold outside city, it would have been 72 1/2 % of wholesale price, the spread between value based on cost method and the other permissible method was insufficient to warrant retroactive abrogation of comptroller's administrative ruling for unreasonableness.

[8] Licenses 34 238k34 Most Cited Cases

[8] Taxation \$\infty\$3704

371k3704 Most Cited Cases

(Formerly 371k1336)

In action by manufacturer to recover occupation taxes paid as a result of a delinquency assessment, trial court's finding on the volume of bakery products sold by the manufacturer outside the city was not contrary to the clear preponderance of the evidence.

[9] Licenses @ 21

238k21 Most Cited Cases

Where instructions to taxpayers set out on back of taxpayer's copy of report form consisted of a summary or paraphrasing of part of occupation tax ordinance, and were intended for general application and did not purport to cover special cases, the instructions did not modify or supplant city comptroller's administrative ruling authorizing use of cost method in determining value of bakery products transported outside city without prior sale.

[10] Taxation © 2781 371k2781 Most Cited Cases

(Formerly 371k542)

In the absence of a legislative requirement, a written protest is not a condition precedent to the obtaining of a refund of excise taxes erroneously assessed.

[11] Licenses \$\infty\$34

238k34 Most Cited Cases

Where neither occupation tax ordinance nor any general state statute required a written protest as condition precedent to obtaining a refund of excise taxes erroneously assessed, taxpayer's failure to file a written protest when it paid delinquency assessment of occupation tax did not preclude recovery of taxes erroneously assessed.

*738 **672 A. C. Van Soelen, C. V. Hoard, Seattle, for appellants.

F. A. LeSourd, Griffith Way, Brockman Adams, Little, LeSourd, Palmer, Scott & Slemmons, Seattle, for respondent.

HAMLEY, Chief Justice.

In this action, Hansen Baking Co., Inc., seeks a refund of excise taxes, penalties, and interest paid to the city of Seattle as a result of a delinquency assessment. Judgment was entered for plaintiff. Defendants appeal.

The pertinent facts are not in dispute. Respondent is engaged in the business of manufacturing bread within the *739 city of Seattle, and selling this product both within and without the city. The manufacturing operation ends when the bread is placed on the loading dock of respondent's plant in Seattle. Some of the bread is then sold, at the loading dock, to independent commission men, who, in turn, sell at wholesale to their own customers. Commission men who distribute such products outside the city purchase the bread at seventy-two and one half per cent of the wholesale price.

Some of the bread, however, is transported from the plant in respondent's trucks, or by common carrier, and sold at wholesale by respondent within or without the city. The question before us pertains to the computation of the city's business and occupation tax on that part of respondent's activity which consists of the manufacture of bread which is thereafter transported out of the city, by or for respond-

ent, without prior sale.

The taxing ordinance (Seattle Ordinance No. 72630), which was enacted in 1943, contains these provisions:

'Section 3. On and after the first day of July, 1943, * * * there is hereby levied upon, and shall be collected from * * * every person on account and for the privilege of engaging in business activities, a license fee or occupation tax, sometimes herein referred to as the 'tax,' in amounts to be determined by application of rates given against value of products, gross proceeds of sale, or gross income of business, as the case may be.

* * *

'(b) Upon every person engaging within this city in business as a manufacturer; as to such persons the amount of tax with respect to such business shall be equal to the value of the products manufactured, multiplied by the rate of one-tenth of one percent;

The measure of the tax is the value of the products so manufactured, regardless of the place of sale, or the fact that the deliveries may be made to points outside the city.

'Section 5. Determination of Values: The value of products extracted or manufactured shall be determined by the gross proceeds derived from the sale thereof, whether such sale is at wholesale or at retail, except:

- '(a) Where such products are extracted or manufactured for commercial use;
- '(b) Where such products are shipped, transported or *740 transferred out of the city, or to another person, without prior sale or are sold under circumstances such that the gross proceeds from the sale are not indicative of the true value of the subject-matter of the sale.

'In the above cases the value shall correspond as nearly as possible to the gross proceeds from sales in this city of similar products of like quality and **673 character, and in similar quantities by other taxpayers. The Comptroller shall prescribe uniform and equitable rules for the purpose of ascertaining such values.'

On September 24, 1943, the comptroller of the city

of Seattle sent a letter to the Seattle Bakers' Bureau, reading in part as follows:

Referring to conference in the City Comptroller's office with representatives of the baking industry, on September 10, 1943, regarding value of products manufactured in Seattle but shipped out to surrounding cities for sale:

It will be acceptable to this office to use the same method of arriving at the value of such products as has been set up by the state in arriving at value of products shipped out of the state, which we understand to be either cost, or not less than 70% of the usual selling price.'

Respondent considered this letter, which has never been rescinded, as an administrative ruling. In computing the tax due on its activity of manufacturing bread which thereafter sold at wholesale outside the city, respondent accordingly measured the value of such products by the cost of manufacture. This course was followed by respondent during the tax years in question, 1948 through 1952. The cost of manufacture, or 'cost to door,' as it is referred to in the record, approximates sixty-five to sixty-seven per cent of the wholesale price in Seattle.

In 1953, a city tax accountant commenced an audit of respondent's business tax returns. This was the first time that the books of any firm engaged in this kind of a baking and wholesaling operation had been audited since the tax became effective ten years before.

As a result of this audit, the city, on March 3, 1953, assessed a deficiency for the years 1948 through 1952. The basis of this assessment was that the value of the products *741 so manufactured and sold should have been measured not by the cost of manufacture, but by the gross proceeds realized from selling the bread at wholesale outside the city. The city used this measure of value, rather than the gross proceeds 'from sales in this city,' as specified in the ordinance, because it found the wholesale price of bread within and without the city to be identical.

Respondent paid the deficiency tax with penalties

296 P.2d 670 48 Wash.2d 737, 296 P.2d 670 (Cite as: 48 Wash.2d 737, 296 P.2d 670)

and interest in the sum of \$935.36, and then brought this action for a refund. As before indicated, the trial court entered judgment for respondent baking company.

[1] The judgment for respondent is predicated upon a finding of fact that the city comptroller's letter of September 24, 1943, constituted a ruling that, with respect to the activity in question, it would be acceptable to use either cost or not less than seventy per cent of the usual selling price.

Appellants question this finding of fact. They call attention to the fact that the second paragraph of that letter states that it would be acceptable to use the same method of arriving at the value of such products 'as has been set up by the state' in arriving at value of products shipped out of the state. It is argued that the value used by the state was 'the gross proceeds from sales in the state of similar products of like quality and character.' Hence, it is contended that the city comptroller's letter authorized only that method of measuring value.

Had the paragraph in question closed with the reference to the 'same method' as had been set up by the state, the purport of the ruling would depend upon ascertainment of the state method. And if it was then established, as appellants assert, that the state method did not permit measurement of value by cost, the finding of fact that the ruling permitted cost measurement would be clearly wrong.

This paragraph of the September 24, 1943, letter, however, did not close with a general reference to the state method. It continued: '* * * which we understand to be either cost, or not less than 70% of the usual selling price.'

In our view, the words last quoted relieved affected taxpayers of the necessity of ascertaining the actual state *742 method. **674 They were told, in effect, that the city had ascertained the state method, and that it permitted cost valuation. Taxpayers would reasonably understand from this statement, and respondent did so understand, that it was permissible to use the cost method.

We therefore sustain the finding of fact that the letter constituted a ruling that it was acceptable to use cost in measuring the value of products transported out of the city without prior sale.

If this ruling resulted from a misunderstanding of the state method by the city, that circumstance would not militate against the finding that such a ruling was made. Rather, it would go to the question of whether an administrative agency may retroactively abrogate or disregard a regulation on the ground that it resulted from an error of fact by the agency. This question, but with reference to another asserted error of fact, is dealt with and answered below.

Appellants next argue that the ruling of the city comptroller, that value could be ascertained by the cost method, is invalid because it is in conflict with the taxing ordinance, and is unreasonable.

[2] Concerning the asserted conflict between the ruling and the taxing ordinance, appellants invoke the rule that an administrative agency may not, by means of an interpretation or clarifying regulation, actually modify or amend the legislative enactment. Fisher Flouring Mills Co. v. State, 35 Wash.2d 482, 492, 213 P.2d 938.

Whether the administrative ruling here under examination modifies or amends the legislative enactment depends upon the meaning to be attached to section 5(b) of the ordinance. This subsection provides, among other things, that where the products are transported out of the city without prior sale.

'* * the value shall correspond as nearly as possible to the gross proceeds from sales in this city of similar products of like quality and character, and in similar quantities by other taxpayers. The Comptroller shall prescribe uniform and equitable rules for the purpose of ascertaining such values.' (Italics supplied.)

*743 Under this subsection, the city comptroller is required to make fact determinations and exercise judgment and discretion. He must find among sales within the city the closest parallel to the quality,

296 P.2d 670 48 Wash.2d 737, 296 P.2d 670 (Cite as: 48 Wash.2d 737, 296 P.2d 670)

character, and quantity of products transported out of the city without prior sale. He must then formulate 'uniform and equitable' rules under which the value of the transported products may be measured 'as nearly as possible' by the gross proceeds of this most nearly similar class of transactions within the city.

The words 'as nearly as possible' plainly suggest that, under a particular factual showing, or in view of particular equitable considerations, it may not be appropriate to use the gross proceeds of any city transaction as a measure of the value of products transported out of the city without prior sale. In such an event, the city comptroller is, we believe, authorized to formulate some other method of measuring value which is uniform and equitable, and which, in his judgment, comes as nearly as possible to corresponding to the gross proceeds of some city transaction.

[3] The administrative ruling prescribed in the letter of September 24, 1943, represents an instance in which the city comptroller found and determined that some measure of value other than gross proceeds was necessary. He held, in effect, that, under the facts which the found to exist and the associated equities, the value which as nearly as possibly corresponds to the gross proceeds from the closest parallel sale within the city is the cost of manufacture. In our opinion, this ruling was of a kind which the city comptroller was authorized to make, and it is therefore not in conflict with the taxing ordinance.

[4][5] In may well be that the city comptroller erred in making the factual determination, or exercised unsound judgment, or abused his discretion in reaching the conclusions represented by the administrative ruling. If so, he is at liberty to alter his findings and conclusions, and promulgate**675 a different rule--but only for future application. An administrative agency may not retroactively impeach its own general rules because of asserted errors of fact, judgment, or discretion on its own part. If it were permissible *744 for a taxing agency to challenge, years later, such rules promulgated by its own enforcement agency, taxpayers would never be

able to close their books with assurance.

[6] The regulation is also asserted to be invalid because it is 'unreasonable.' Appellant maintains that the regulation is unreasonable because it applies to a specific industry only, and not to all manufacturers.

Section 5 of the ordinance contemplates that regulations shall be prescribed to meet special circumstances. In issuing his letter of September 24, 1943, the city comptroller was confronted with circumstances which, in so far as the record indicates, may have been peculiar to the baking industry. The burden of proving otherwise, which was upon appellants, has not been sustained.

[7] It is also contended that the regulation is unreasonable because it fixed value at cost, 'which obviously could not be the actual value or there would be no production.'

Granting the logic of the quoted words, we do not believe that it warrants the drastic action represented by the 1953 deficiency assessment. The value, when measured by cost, approximate sixty-five to sixty-seven per cent of the wholesale price in Seattle. Had the city comptroller measured value by the sales to commission men who sell outside the city (as we believe he could have done), it would have been seventy-two and one half per cent of the wholesale price. In our opinion, the spread between the value used and that which would have been clearly permissible is insufficient to warrant retroactive abrogation of the regulation for unreasonableness.

[8] Appellants next contend that respondent failed to sustain it burden of proof as to the volume of products sold by respondent outside of Seattle.

This contention was not advanced in the trial court, except in respondent's brief on its motion for reconsideration. As there raised, this argument was made only on the assumption that the letter ruling was invalid and that respondent should have pleaded and proved some different method of apportionment. In any event, our examination of the record convinces

(Cite as: 48 Wash.2d 737, 296 P.2d 670)

us that the trial court's finding of *745 fact concerning the volume of products sold by respondent outside the city is not contrary to the clear preponderance of the evidence.

[9] Another argument advanced by appellants is that, in making the delinquency assessment, the tax was computed in the manner specified in the instructions to taxpayers set out on the back of the taxpayer's copy of the report form, and must therefore be upheld.

We have examined these tax instructions, and find them to be a summary or paraphrasing of part of the taxing ordinance. The instructions are apparently intended for general application, and do not purport to cover special cases, such as are dealt with in the letter of September 24, 1943. In our view, the instructions were not intended to modify or supplant the method of computing value in certain cases, as set out in the letter.

[10][11] Appellants argue that respondent's failure to file a written protest when it paid the delinquency assessment required dismissal of the action.

In the absence of a legislative requirement that a written protest be filed, none is necessary in order to preserve the taxpayer's position in connection with the payment of a state excise tax. Great Northern Ry. Co. v. State, 200 Wash. 392, 414, 93 P.2d 694; Columbia Steel Co. v. State, 34 Wash.2d 700, 707, 209 P.2d 482. We believe the same rule is applicable to a city excise tax. Neither the ordinance here under review nor any general state statute requires a written protest as a condition precedent to the obtaining of a refund of excise taxes erroneously assessed.

Finally, appellants challenge the entry of a personal judgment for the amount of the refund against W. C. Thomas, who is the comptroller of the city of Seattle. While not conceding that entry of judgment **676 against Thomas was erroneous, counsel for respondent, at the oral argument, advised us that respondent has no objection to amending the judgment so as to name the city as the only judgment debtor. Accordingly, we do not pass upon the mer-

its of this assignment.

*746 The judgment is modified so as to dismiss the action, without costs, as to W. C. Thomas. As modified, the judgment is affirmed. Respondent will recover its costs on appeal from appellant, city of Seattle.

OTT, MALLERY, WEAVER and ROSELLINI, JJ., concur.

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END OF DOCUMENT

Group Health Cooperative of Puget Sound, Inc. v. Washington State Tax Comm'n, 72 Wn.2d 422, 433 P.2d 201 (1968)



433 P.2d 201

72 Wash.2d 422, 433 P.2d 201

(Cite as: 72 Wash.2d 422, 433 P.2d 201)

Supreme Court of Washington, Department 2.
GROUP HEALTH COOPERATIVE OF PUGET
SOUND, INC., Respondent,

WASHINGTON STATE TAX COMMISSION,
Appellant.
No. 38714.

Nov. 2, 1967. Rehearing Denied Jan. 22, 1968.

Appeal from order of state tax commission imposing retroactive assessment of business and occupation taxes against amounts derived from certain of activities of group health cooperative. The Superior Court, Thurston County, Charles T. Wright, J., entered judgment adverse to commission which appealed. The Supreme Court, Hamilton, J., held that such portion of cooperative's 'dues' revenue as could be properly allocated to services performed by outlying clinics were subject to business and occupation taxes from effective date of 1961 amendment to tax statute, but tax should not have been assessed against cooperative's central clinic which formed functional and physical component of hospital facility.

Judgment modified.

West Headnotes

[1] Appeal and Error \$\infty\$ 1008.1(1)

30k1008.1(1) Most Cited Cases

(Formerly 30k1008.1, 30k1008(1))

Where appellant assigned error to number of trial court's findings of fact, but did not contend findings were lacking in evidentiary support and challenged trial court's conclusions of law, and findings of fact were to a large measure predicated upon stipulated or undisputed facts, reviewing court would accept such findings as verities.

[2] Licenses € 30 238k30 Most Cited Cases Where state tax commission for period of more than 10 years allowed deduction of health cooperative's fee revenue, commission was precluded thereafter from impeaching its form-

[3] Taxation 2392

371k2392 Most Cited Cases

(Formerly 371k251.1, 371k251)

al ruling by levying deficiency assessment.

[3] Taxation \$\infty\$2723

371k2723 Most Cited Cases

(Formerly 371k485(1))

Both a tax "exemption" which does not amount to total immunity and a "deduction" presuppose a taxable status and must be claimed by taxpayer if he is to benefit from either and, in connection with either, burden of showing qualification for tax benefit afforded likewise rests with the taxpayer.

[4] Taxation @== 2167

371k2167 Most Cited Cases

(Formerly 371k58)

[4] Taxation 2300

371k2300 Most Cited Cases

(Formerly 371k204(2))

Statutes which provide for either tax "exemption" or "deduction" are, in case of doubt or ambiguity, to be construed strictly, though fairly, and in keeping with ordinary meaning of their language, against the taxpayer.

151 Licenses 29

238k29 Most Cited Cases

Amounts derived as compensation for services furnished to patients by hospital, as such facilities and services are ordinarily comprehended, are deductible from business and occupation tax, but ordinary medical consultation and treatment, such as one seeks and obtains in doctor's office, or clinic, however paid for, are not deductible. RCWA 70.41.010 et seq., 70.41.020(3).

[6] Health © 237

198Hk237 Most Cited Cases

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(Cite as: 72 Wash.2d 422, 433 P.2d 201)

(Formerly 371k1237, 238k15.1(5))

Such portion of group health cooperative's "dues" revenue as could be properly allocated to services performed by outlying clinics were subject to business and occupation taxes from effective date of 1961 amendment to tax statute, but tax should not have been assessed against cooperative's central clinic which formed functional and physical component of hospital facility. RCWA 82.04.430(2, 9).

[7] Licenses € 29238k29 Most Cited Cases

Monthly "medical dues" paid by members of group health cooperative did not qualify as permissible deductions from business and occupation tax under statutory bona fide dues deduction, where totality of cooperative services to membership over given period of time was financially geared to aggregate of monthly fees received or anticipated for operational expenses and there were differences in fees between age, sex, and nature of coverage sought by or anticipated by prospective members. RCWA 82.04.430(2).

**202 John J. O'Connell, *423 Atty. Gen., Henry W. Wager, Timothy R. Malone, Asst. Attys. Gen., Olympia, for appellant.

Houghton, Cluck, Coughlin, Schubat & Riley, Seattle, for respondent.

HAMILTON, Judge.

Respondent Group Health Cooperative of Puget Sound, Inc., appealed to the Superior Court of Thurston County from an order of the State Tax Commission imposing a retroactive assessment of business and occupation taxes against amounts derived from certain of its activities and receipts between the years of 1959 and 1962. Respondent contended the amounts against which the tax was assessed were covered by and entitled to be excluded from the tax under the provisions of RCW 82.04.430(2) and/or RCW 82.04.430(9). The superior court, upon the basis of admitted facts and supplementary oral testimony, entered findings of fact, conclusions of law, and judgment reversing the holding of the Tax Commission upon the ground

that the tax assessed ws deductible pursuant to RCW 82.04.430(9). The Tax Commission appeals.

Appellant assigns error to pertinent portions of the trial court's findings of fact, conclusions of law, and judgment. Primarily, the arguments emanating from appellant's assignments go to the issue of whether the deductions permitted under either RCW 82.04.430(2) or (9) are applicable to the pertinent activities of respondent. Secondarily, respondent contends that appellant is foreclosed from making retrospective assessments dating back to 1959 by virtue of its prior treatment of the assessed income as deductible under RCW 82.04.430(9).

Backgroundwise, the stipulated facts, the testimony, and the trial court's findings reveal that respondent is a nonprofit, non-stock, membership corporation, whose principal activity is furnishing comprehensive prepaid medical and hospital care to its individual membership and organizational contractees.

*424 Individual membership is open to any person or family unit without discrimination upon approval of a prescribed application and the payment of \$200 in entrance fees coupled with regular monthly sums as fixed from time to time by respondent's board of trustees. The \$200 entrance fee, a portion of which is refundable following termination of membership, is characterized by respondent as 'capital dues' and is devoted to capital facilities. The monthly payments, in turn, are characterized as 'medical dues' and are devoted to operational expenses.

Organizational participation, e.g., labor unions, fraternal bodies, etc., in respondent's services is accomplished by group contract. The form, nature, and characterization of the amounts received from such group contracts are not revealed by the record, and any allocation of such amounts for tax purposes has been deferred by the parties pending disposition of this case.

In carrying out its purpose and function, respondent has acquired a hospital complex in central Seattle which, besides hospital wards, houses respondent's principal laboratory, X ray, pharmaceutical, physio433 P.2d 201 72 Wash.2d 422, 433 P.2d 201 (Cite as: 72 Wash.2d 422, 433 P.2d 201)

therapy, surgical, specialized professional and administrative staff, and warehousing departments. When member patients, for any medical reason, are required to be observed or treated for any continuous period beyond 24 hours they are referred to and afforded hospitalization at this main facility (hereafter referred to as the 'central facility'). Included within the complex of the central facility is an area designated as the 'central clinic,' the 'outpatient clinic,' or the 'diagnostic and treatment (hereafter referred to as the 'central clinic'), to which member patients come or are directed, on a round-the-clock basis, for such medical care, consultation, and attention as may not require overnight retention. The entire central **203 facility complex is and has been exempt from property taxation since 1949.

In addition to the central facility and the central clinic, respondent owns and operates, for the convenience of its members, three separate 'outlying clinics' at Renton, Northgate, and Burien, established in 1948, 1958, and 1964, *425 respectively. These outlying clinics are operated by regular professional and staff personnel assigned thereto, are open only during normal business hours, and furnish such medical care, attention, and treatment to member patients as does not require overnight facilities and service. Member patients who cannot be cared for at these outlying clinics or who require hospitalization or specialized treatment are referred to the central facility. At all times concerned, ad valorem taxes have been paid by respondent with respect to each of the outlying clinics.

The business and occupation taxes in question were assessed on July 26, 1963, against that portion of respondent's gross revenue, derived from its members as monthly 'medical dues,' attributable on a cost of operation basis to the services furnished by the central and existent outlying clinics between the years of 1959 and 1962, inclusive. (It should be noted at this point that the Burien clinic heretofore referred to was not in existence during the tax period in question; however, its tax status after 1964 will be affected by this case.) No tax was assessed upon that portion of such gross receipts as were al-

locable to the operation of respondent's central facility, exclusive of the central clinic.

[1] In approaching the issues raised by the respective arguments and contentions of the parties, we pause to observe that although appellant has assigned error to a number of the trial court's findings of fact, it does not contend such findings are lacking in evidentiary support. Rather, appellant contents itself with challenging the trial court's conclusions of law. Under these circumstances, and since the findings of fact are to a large measure predicated upon stipulated or undisputed facts we in turn accept such findings as verities. Thorndike v. Hesperian Orchards, Inc., 54 Wash.2d 570, 343 P.2d 183 (1959).

The issues of law thus presented will be discussed in the following order: (a) Whether appellant is foreclosed, under the circumstances prevailing, from making a retrospective assessment; (b) the extent or applicability of the deduction permitted by RCW 82.04.430(9); and (c) the *426 applicability of the deduction provided by RCW 82.04.430(2).

Prefatory to a consideration of the first issue, it is necessary to understand that RCW 82.04.430(9), which permits a deduction of certain types of hospital revenue from the measure of the business and occupation tax, was amended by the legislature in 1961 and that the assessment here concerned (for the years 1959 through 1962, inclusive) spans the amendment. Thus, we are concerned with the affect of appellant's actions and rulings before and after the 1961 amendment, for it is these actions which respondent contends amount to a retroactive impeachment of appellant's own rulings.

Upon this issue, the trial court entered finding of fact No. 5, which, in part, reads:

Since June 9, 1949, and up to the time that the assessment was made on July 26, 1963, which is complained of herein, the Commission at all times herein has treated the dues and other income covered by the assessment (Ex. 1) in this proceeding as deductible pursuant to RCW 82.04.430(9).

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This finding was supported and buttressed by the following circumstances: In 1947, the attorney general rendered an opinion holding that respondent's organization, as it then existed, was entitled to deduct its membership fee revenue under RCW 82.04.430(9) as that statute then read,[FN1] *427 subject, however, to the attainment **204 of a tax exemption upon its hospital property; in 1948, respondent established and commenced operating the outlying clinic in Renton; in 1949, respondent was granted a tax exemption on its hospital property at which time it was operating what is now the central clinic at a separate location; appellant, upon being notified of the property tax exemption, advised respondent by letter[FN2] it would thereafter be entitled to the deduction in question under RCW 82.04.430(9); in 1953, appellant audited respondent and issued an assessment measured in part by the fees paid by the members, which assessment appellant, upon petition of respondent, amended to continue the deduction of the fee revenue as before; in 1958, respondent established and began the operation of its second outlying clinic in Northgate; and, so far as the record reveals, appellant continued to allow the pertinent deduction until after the 1961 statutory amendment and the assessment of July, 1963.

> FN1. The provisions of RCW 82.04.430(9) find their genesis in Laws of 1935, ch. 180, s 11(i), p. 719, where they first appeared as a tax exemption. Although the statutory language of the original provision was amended in 1937 and 1941, it continued in a tax exemption category until 1945 when the legislature not only again amended its language but also changed it from a tax exemption provision to a tax deduction provision. (Laws of 1945, ch. 249, ss 2 and 3, pp. 737--42.) The language of the 1945 amendment remained unchanged until the 1961 amendment and, in pertinent part, reads as follows: 'In computing tax there may be deducted from the measure of tax the following items:

> '(i) Amounts derived as compensation for services rendered to patients by a hospital

or other institution which is organized as a non-profit corporation devoted to the care of human beings with respect to the prevention or treatment of disease, sickness or suffering: Provided, That no part of the net earnings received by such an institution shall inure, directly or indirectly, to any person other than the institution entitled to deduction hereunder: Provided further, That in no event shall any such deduction be allowed, unless the hospital building is entitled to exemption from taxation under the property tax laws of this state, and unless the superintendent or other proper officer of the institution shall, under oath, make annual reports to the State Board of Health of its receipts and disbursements during the preceding year, specifying in detail the sources from which receipts have been derived, and the object to which disbursements have been applied, and shall furnish in said report full and complete vital statistics for the use and information of the State Board of Health: * * *.' Laws of 1945, ch. 249, s 3, p. 741.

FN2. Appellant's letter of notification, dated June 9, 1949, and signed by a then member of the Tax Commission reads as follows: 'We are in receipt of your letter of June 3 enclosing photostatic copy of a letter of the King County Assessor granting exemption from property tax to Group Health Cooperative of Puget Sound, Inc. 'In consequence of this filing you are advised that this cooperative will henceforth be entitled to the deduction in computing business and occupation tax under the provisions of Subsection (i), Section 12, Chapter 180, Laws of 1935, as amended.'

[2] Under these facts, the net effect of appellant's 1963 *428 assessment, insofar as it relates to respondent's fee revenue prior to the 1961 amendment of RCW 82.04.430(9), is an aboutface with respect to its own prior administrative determination, interpretation, and application of the statutory

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deduction to respondent's operation. Appellant's ruling allowing the deduction in 1949 and the years following thereafter did not amount to an administrative modification or amendment of a legislative enactment as appellant now contends. Respondent's initial application and continued claim of the pertinent deduction, under the statute as worded by the 1945 legislative amendment, clearly called for and authorized a factual determination and exercise of judgment and discretion on the part of appellant with respect to respondent's organization. If the allowance of the deduction prior to the 1961 amendment of RCW 82.04.430(9) was erroneous, as appellant now contends it was, the error was due to appellant's **205 misconstruction of the facts rather than its misinterpretation of the law as it then stood. This being so, we are satisfied appellant's turnabout falls within the ambit of our decision in Hansen Baking Co. v. City of Seattle, 48 Wash.2d 737, 296 P.2d 670 (1956), wherein we subscribed to the principle that an administrative agency could not retroactively impeach its own lawful rulings. In this connection, and in passing upon an analogous set of facts involving a retroactive assessment of the business and occupation tax by the Comptroller of the City of Seattle, we said, at 743, 296 P.2d at 674:

It may well be that the city comptroller erred in making the factual determination, or exercised unsound judgment, or abused his discretion in reaching the conclusions represented by the administrative ruling. If so, he is at liberty to alter his findings and conclusions, and promulgate a different rule--but only for future application. An administrative agency may not retroactively impeach its own general rules because of asserted errors of fact, judgment, or discretion on its own part. If it were permissible for a taxing agency to challenge, years later, such rules promulgated by its own enforcement agency, taxpayers would never be able to close their books with assurance.

*429 We can conceive of no logical reason why this principle should not apply to appellant under the facts of this case. Accordingly, we hold that appellant is precluded from impeaching its former ruling by levying a deficiency assessment antedating

the effective date of the 1961 amendment to RCW 82.04.430(9). We do not extend this holding to any lawful assessments levied after the effective date of the amendment in question for the reason that the language of the statute authorizing the deduction was changed in such a fashion as to necessitate a re-evaluation of respondent's entitlement thereunder. Appellant was, therefore, obligated to make a redetermination and the partial 1963 assessment was the result. It remains, then, to consider whether appellant made a correct determination regarding any of the remaining portions of the assessment.

We turn, thus, to the second issue presented, namely, the applicability and the extent thereof of RCW 82.04.430(9) as amended by Laws of 1961, ch. 293, s 5, p. 2363.

[3][4] Before proceeding with a direct consideration of this issue, and with the third issue--the applicability of RCW 82.04.430(2)--we pause to observe that we attach no particular significance to the characterization of the statutory tax exclusions as 'deductions' rather than 'exemptions' insofar as the rules of statutory construction applicable here be concerned. Both a tax 'exemption,' which does not amount to total immunity, and a 'deduction' presuppose a taxable status and must be claimed by the taxpayer if he is to benefit from either. In connection with each, the burden of showing qualification for the tax benefit afforded likewise rests with the taxpayer. And, statutes which provide for either are, in case of doubt or ambiguity, to be construed strictly, though fairly and in keeping with the ordinary meaning of their language, against the taxpayer. Crown Zellerbach Corp. v. State, 45 Wash. 2d 749, 278 P.2d 305 (1954); Helvering v. Ohio Leather Co., 317 U.S. 102, 63 S.Ct. 103, 87 L.Ed. 113 <u>(1942)</u>.

With respect to RCW 82.04.430(9), it is appellant's contention that the central clinic and the three outlying clinics do not qualify as hospitals or otherwise meet the requirements *430 of the statute allowing the claimed deduction. On the other hand, it is respondent's contention that the respective clinics are an integral and integrated part of their hospital

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or central facility.

We agree with appellant as to the outlying clinics but disagree as to the central clinic.

**206 RCW 82.04.430(9), as amended by Laws of 1961, ch. 293, s 5, reads:

In computing tax there may be deducted from the measure of tax the following items:

(9) Amounts derived as compensation for services rendered to patients by a hospital, as defined in chapter 70.41, which is operated as a nonprofit corporation, nursing homes and homes for unwed mothers operated as religious or charitable organizations, but only if no part of the net earnings received by such an institution inures directly or indirectly, to any person other than the institution entitled to deduction hereunder. In no event shall any such deduction be allowed, unless the hospital building is entitled to exemption from taxation under the property tax laws of this state.

RCW 70.41, dealing with hospital licensing and regulation, defines a hospital in the following manner (RCW 70.41.020(3)):

'Hospital' means any institution, place, building, or agency which provides accommodations, facilities and services over a continuous period of twenty-four hours or more, for observation, diagnosis, or care, of two or more individuals not related to the operator who are suffering from illness, injury, deformity, or abnormality, or from any other condition for which obstetrical, medical, or surgical services would be appropriate for care or diagnosis. 'Hospital' as used in this chapter does not include hotels, or similar places furnishing only food and lodging, or simply domiciliary care; nor does it include clinics, or physician's offices where patients are not regularly kept as bed patients for twenty-four hours or more; * * *.

Combining the above two statutes in pertinent part, we have:

*431 Amounts derived as compensation for services rendered to patients by a hospital * * *

defined (as) * * * any institution, place, building, or agency which provides accommodations, facilities and services over a continuous period of twenty-four hours or more, for observation, diagnosis, or care, of two or more individuals * * * who are suffering from illness, injury, deformity, or abnormality, or from any other condition for which obstetrical, medical, or surgical services would be appropriate for care or diagnosis. * * *(,) which is operated as a nonprofit corporation, * * * but only if no part of the net earnings received by such an institution inures directly or indirectly, to any person other than the institution entitled to deduction hereunder. In no event shall any such deduction be allowed, unless the hospital building is entitled to exemption from taxation under the property tax laws of this state. * * * 'Hospital' * * * does not include * * * clinics, or physician's offices where patients are not regularly kept as bed patients for twenty-four hours or more; * * *.

[5] Whatever else may be said regarding the clarity, or lack of clarity, in the statutes or any combination thereof, and/or about the uniqueness of respondent's organization and operation, it appears reasonably evident that the legislature basically had in mind, as deductible amounts from the measure of the tax imposed, such amounts as were derived as compensation for services furnished to patients by a hospital, as such facilities and services are ordinarily comprehended. We are satisfied, from the language used in the statute and in the definition, that ordinary medical consultation and treatment, such as one seeks and obtains in a doctor's office, or clinic, however paid for, was not contemplated as being within the range of the pertinent deduction.

It is true, as the trial court found, that organizationwise respondent corporation is integrated and its various activities are interrelated. Yet, it is also true that respondent undertakes to furnish to its members, according to its membership agreement and fee or 'medical dues' schedule, two severable **207 types of health service and coverage, i.e., *432 Medical consultation, diagnosis, treatment, and care by way of home or office calls, and Hospitalization 433 P.2d 201 72 Wash.2d 422, 433 P.2d 201 (Cite as: 72 Wash.2d 422, 433 P.2d 201)

together with the usual services accompanying such a confinement. The first type of service is essentially furnished and performed in respondent's outlying clinics. The second type of service is, of course, supplied through respondent's central or hospital facility, including in some measure, at least, the central clinic which serves the central complex on a basis akin to the ordinary intake or emergency room in the average hospital. In short, the type of coverage offered by respondent to its members is not too dissimilar from that afforded by various other hospital and medical insurance plans. The uniqueness of respondent's operation springs principally from the fact that it is a cooperative. owns and operates its own facilities, and employs its own professional medical staff in all of its phases.

As we have indicated, the line of demarcation between the character of the services supplied by respondent is reasonably discernible. Likewise, the division between the facilities which afford the respective services is, with the exception of the central clinic, fairly observable. In this vein, the stipulated facts, the evidence presented, and the trial court's findings clearly reveal that the outlying clinics are staffed, equipped, administered, and provide that type of medical service to the members which one would expect to find and receive in the average private physician's office or clinic. They are open only during regular business hours, provide no domiciliary care or overnight facilities, and are physically separate and apart from the central or hospital complex. And, as with the ordinary doctor's office, when the patient's needs exceed the resources at hand referral to specialists or to the hospital, as the case may be, is recommended and becomes available. The only difference, in this latter respect, from a private practitioner's procedure, is that the member patients are referred to respondent's staff specialists and/or hospital complex rather than to other resources, and the budgeting, accounting, and supply functions are handled by a central agency.

On the other hand, the central facility, including the *433 central clinic, furnishes modern as well as all

of the traditional hospital services, i.e., bed wards, surgery rooms, laboratories, X-ray equipment, pharmaceutical supplies, specialized professional staff, nursing staff, catering services, and 24 hour intake and emergency facilities. These services differ in no substantial way, except in their over-all organizational scheme, from the ordinary hospital. Within the framework of this aspect of respondent's service, the central clinic truly forms an integral, interrelated and essential part of the central facility. for, although it undertakes to provide some outpatient services akin to the outlying clinical service, it nevertheless provides the round-the-clock intake and emergency services which form a constituent part of the normal hospital operation. In this sense, then, the central clinic is no more separable from the central or hospital facility than the surgery rooms, the bed wards, the laboratory or the other components of the hospital activity, all of which might incidentally perform some out-patient service.

In addition to the foregoing, although we do not consider it decisive in this case, is the fact that respondent's outlying clinics are not exempt from property taxes, whereas the central clinic, as a part of the central facility, enjoys such a tax exempt status.

[6] We conclude, from the foregoing, that appellant was warranted, under RCW 82.04.430(9), as amended, in assessing the tax in question against such portion of respondent's 'dues' revenue as could be properly allocated to the services performed by the outlying clinics since the effective date of the 1961 amendment to that statute. The appellant was not, however, warranted in attempting to segregate, allocate, and assess the tax against the central clinic, which forms a functional and physical component of the hospital facility.

**208 [7] We turn, finally, to the third issue presented, that is, whether the monthly fees paid by respondent's members fall within the 'bona fide dues' deduction permitted by RCW 82.04.430(2), which provides:

*434 In computing tax there may be deducted

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from the measure of tax the following items:

(2) Amounts derived from bona fide initiation fees, dues, contributions, donations, tuition fees, and endowment funds. This paragraph shall not be construed to exempt any person, association, or society from tax liability upon selling tangible personal property or upon providing facilities or services for which a special charge is made to members or others. Dues which are for, or graduated upon, the amount of service rendered by the recipient thereof are not permitted as a deduction hereunder; * * *.

We cannot agree with respondent that the monthly 'medical dues' or fees paid by its membership constitute 'bona fide' dues within the contemplation of the foregoing statute. Respondent is organized to provide comprehensive, prepaid medical and hospital services to its membership, and however respondent may characterize these monthly payments they are, under the evidence adduced, devoted to the operational expenses of the organization and are subject to change from time to time. The conclusion is inescapable, and was tacitly if not directly recognized by one of respondent's witnesses, that if respondent's operation is to be actuarially sound, the monthly fees must of necessity be related to or graduated upon the cost of operation which, in turn, reflects upon the services available and furnished to its members. The fact that respondent may choose to call the monthly payments 'dues,' or the fact that by the very nature of its operation some members receive more services than others, does not change the underlying fact that the totality of its services to its membership over a given period of time is financially geared to the aggregate of the monthly fees received or anticipated for operational expenses over a given period of time. Furthermore, it appears from respondent's fee schedule, accompanying its Membership Agreement, that initial or introductory monthly fees vary between age, sex, and nature of coverage sought by or anticipated for a prospective member. These classifications, and the monthly fees attributed to each, are undoubtedly *435 based upon distinctions between the nature and extent of services that may be required or expected by an average of the respective age, sex, or other groupings.

Under these circumstances, it is our view that the monthly fees involved in this case do not qualify as a permissible deduction under RCW 82.04.430(2) for the reason that they are 'Dues which are for, or graduated upon, the amount of service rendered By the recipient thereof.' (Italics ours.) Cf. Red Cedar Shingle Bureau v. State, 62 Wash.2d 341, 382 P.2d 503 (1963).

In summary and for the reasons above stated, we hold that (a) appellant is precluded from levying the challenged assessments for business and occupation tax against respondent based upon respondent's operations prior to the effective date of Laws of 1961, ch. 293, s 5; (b) appellant was and is warranted in levying the challenged assessments, insofar as they may be correct, when measured by respondent's 'medical dues' income properly allocable to the services furnished by the 'outlying clinics' only; and (c) the 'medical dues' in question do not qualify as permissible deductions under RCW 82.04.430(2).

The judgment of the trial court is modified to conform herewith. Each party shall bear its own costs.

FINLEY, C.J., HUNTER, J., and BARNETT, J. protem., concur.

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